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The Schiavo Case: Legal Issues

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Summary

Recently, there have been a series of court and legislative actions regarding the proposed withdrawal of nutrition and hydration from a Florida patient, Theresa Schiavo, who has suffered severe brain damage. This report provides a synopsis of the factual and legal issues related to the case. The report then analyzes P.L. 109-3, "For the relief of the parents of Theresa Marie Schiavo." This law provides that either parent of Theresa Marie Schiavo shall have standing to bring a suit in federal court. Under this law, the federal courts shall determine *de novo* any claim of a violation of any right of Theresa Marie Schiavo under either the Constitution or the laws of the United States, as it relates to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.

The parents of Theresa Schiavo sought injunctive relief under this law from the United States District Court for the Middle District of Florida. The court denied a motion for a temporary restraining order to require the provision of nutrition and hydration to Theresa Schiavo, finding that there was not a substantial likelihood that the plaintiffs would win on the merits. The United States Court of Appeals reviewed this order, and determined that the Congress had not amended the standards for a temporary restraining order, nor had the district court abused its discretion in denying the motion. The Supreme Court has denied a writ of certiorari regarding this decision.

For a comprehensive discussion of statutory and legal issues surrounding the termination of medical treatment, nutrition, and hydration, *see* CRS Report 97-244, "The Right to Die: Constitutional and Statutory Analysis." For links to relevant court documents regarding the Schiavo case, see [http://www.miami.edu/ethics2/schiavo/timeline.htm].

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Background

Theresa Schiavo, at the age of 27, suffered a cardiac arrest as a result of a potassium imbalance, and never regained consciousness.[1] Since 1990, she has lived in nursing homes and a hospice with constant care, where she is fed and hydrated by tubes. Although she has had numerous health problems, none have been life-threatening. A number of courts have found that Theresa, whose husband is acting as her guardian, is in a permanent or persistent vegetative state.[2] Further, Theresa's brain damage is apparently incurable, as much of the cerebral cortex has been replaced by cerebral spinal fluid.

On February 11, 2000, Judge Greer of the Probate Division of the Circuit Court for Pinellas County, Florida, directed the withdrawal of nutrition and hydration from Theresa Schiavo.[3] In 2001, the Florida Court of Appeals considered whether to allow this termination of life-prolonging procedures under chapter 765 of the Florida Statutes[4] and under the constitutional guidelines enunciated by the Supreme Court in the case of *In re Guardianship of Browning.*[5] In the case of *Browning,* the Florida Supreme Court considered the case of a patient who was incompetent, but not in a permanent vegetative state, and who suffered from an incurable, but not terminal, condition. In this case, the court found that a guardian could exercise the patient's right of self-determination to forgo sustenance provided artificially by a nasogastric tube. The case, however, did require that the guardian have clear and convincing proof that the patient would not have wanted food and water provided to them in their present medical circumstance.

In the *Schiavo* case, the trial court had found that, despite conflicting testimony, there was sufficient evidence to support such a finding. Although the testimony only involved a few oral statements to her friends and family about the dying process, the appeals court found that there was a sufficient basis for the trial court's conclusion. The appeals court finding was apparently influenced by the nature of Theresa

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[1] *In Re* Guardianship of Theresa Marie Schiavo, 780 So. 2d 176 (Fla. App. Ct. 2001).

[2] Persistent vegetative state patients are permanently unconscious and devoid of thought, emotion, and sensation. The state is described as a form of eyes-open permanent unconsciousness in which the patient has periods of wakefulness and physiological sleep/wake cycles. Id. at 177.

[3] In Re the Guardianship of Theresa Marie Schiavo, Case No. 90-2908GD-003 (Feb. 11, 2000); *see* [http://www.miami.edu/ethics2/schiavo/021100-Trial%20Ct%20Order%200200.pdf].

[4] Chapter 765 deals with Health Care Advance Directives.

[5] 568 So. 2d 4 (Fla. 1990).

Schiavo's medical condition, and whether she would have wanted continued medical care after being in a persistent vegetative state for over 10 years.

This court decision, however, was followed by a series of legal proceedings initiated by the parents of Theresa Schiavo[6] and others,[7] intended to overturn or delay implementation of the appeals court decision.[8] Then, in October of 2003, the Florida legislature passed a bill granting the Governor the authority to "stay" the withholding of nutrition and hydration in a situation such as existed in the *Schiavo* case,[9] a power that the Governor promptly exercised.[10] This legislative "stay," however, was challenged as a violation of the doctrine of separation of powers and of Theresa Schiavo's due process rights, and the law was subsequently overturned by the Florida Supreme Court.[11] Ultimately, the trial judge in the case set the date of March 18, 2005, for the withdrawal of nutrition and hydration, and the withdrawal occurred on that date.

"For the Relief of the Parents of Theresa Schiavo" Act

On March 21, the Congress passed P.L. 109-3, "For the relief of the parents of Theresa Marie Schiavo" (Schiavo Law). This law provides that either parent of Theresa Marie Schiavo shall have standing[12] to bring a suit in federal court.[13] Under

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[6] *See, e.g., In Re* Guardianship of Theresa Marie Schiavo, 792 So. 2d 551 (Fla. Ct. App. 2001); *In Re* Guardianship of Theresa Marie Schiavo, 800 So. 2d 640 (Fla. Ct. App. 2001); *In Re* Guardianship of Theresa Marie Schiavo, 851 So. 2d 182 (Fla. Ct. App. 2003).

[7] *See, e.g.,* Advocacy Center for Persons with Disabilities v. Schiavo, 2003 U.S. Dist. LEXIS 19949 (M.D. Fla. October 21, 2003).

[8] For a comprehensive summary of relevant factual and legal events related to this case, see [http://www.miami.edu/ethics2/schiavo/timeline.htm].

[9] *See* Fla. Stat. § 765.404 note.

[10] *See* Laurie Cunningham, *Legal Experts Say New Law Allowing Governor to Overrule Court Violates Separation of Powers*, Miami Daily Business Review 1 (October 23, 2003).

[11] Bush v. Schiavo, 885 So. 2d 321 (2004).

[12] P.L. 109-3, § 2 provides that:

> Any parent of Theresa Marie Schiavo shall have standing to bring a suit under this Act. The suit may be brought against any other person who was a party to State court proceedings relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain the life of Theresa Marie Schiavo, or who may act pursuant to a State court order authorizing or directing the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.

[13] P.L. 109-3, § 1 provides that:

> The United States District Court for the Middle District of Florida shall have jurisdiction to hear, determine, and render judgment on a suit or claim by or on

(continued...)

the new law, the federal courts shall determine *de novo*[14] any claim of a violation of any right of Theresa Marie Schiavo under either the Constitution or laws of the United States, as relates to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.[15] The suit must be filed within 30 days of the enactment of the proposed bill.[16]

The parents of Theresa Schiavo immediately sought a temporary restraining order, declaratory order, preliminary and permanent injunctive relief under the bill. The district court, ruling on the motion for a temporary restraining order, denied the request.[17] The court ruled under the prevailing standard for a temporary restraining order, which requires a moving party to prove that:

> (1) it has a substantial likelihood of success on the merits;
> (2) irreparable injury will be suffered unless the injunction issues;
> (3) the threatened injury to the movant outweighs whatever damages the proposed injunction may cause the opposing party; and
> (4) if issued, the injunction would not be adverse to the public interest.

The parents made a series of arguments to establish the likelihood of success on the merits. Count I argued that Terri Schiavo's Fourteenth Amendment Rights were violated because the presiding judge of the Florida probate court that had ordered the withholding of nutrition and hydration had "become Terri's health care surrogate"[18] while also purporting to act as a impartial trial judge in the proceeding. The district court found that there was little likelihood of success on this argument, noting that

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[13] (...continued)
behalf of Theresa Marie Schiavo for the alleged violation of any right of Theresa Marie Schiavo under the Constitution or laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.

[14] A *de novo* trial is a hearing on a case as if it had not been heard before and no previous decision had been rendered. Blacks Law Dictionary 435 (2004).

[15] P.L. 109-3, § 2 provides that:

> In such a suit, the District Court shall determine de novo any claim of a violation of any right of Theresa Marie Schiavo within the scope of this Act, notwithstanding any prior State court determination and regardless of whether such a claim has previously been raised, considered, or decided in State court proceedings. The District Court shall entertain and determine the suit without any delay or abstention in favor of State court proceedings, and regardless of whether remedies available in the State courts have been exhausted.

[16] For a discussion of other congressional bills relevant to this case, *see* CRS Report 97-244.

[17] Schiavo *ex rel.* Schindler v. Schiavo, Case No. 8:05-CV-530-T-27TBM (M.D. Fla. March 22, 2005). For a copy of the opinion for the United States Federal District Court *see* [http://news.findlaw.com/legalnews/lit/schiavo/index.html#docs].

[18] This language was apparently invoked based on a Florida Court of Appeals decision in which the court considered charges of bias against Michael Schiavo as a guardian. The court had discounted the concerns about bias by indicating the court was "serv[ing] as the surrogate decision-maker." 780 So. 2d 176, 178 (Fla. Dist. Ct. App. 2001).

the jurisdiction of the Florida court had been invoked because of a dispute between Michael Schiavo and Theresa Schiavo's parents.[19] Absent a showing that the Florida guardianship court was biased, the federal district court found nothing to indicate that the Florida statutory scheme turned the judicial role of fact-finding and decision-making into one of advocacy.

The parents also argued that the Florida probate court had violated Theresa's Schiavo's procedural due process rights by failing to appoint a guardian *ad litem* or an independent attorney to represent Theresa Schiavo's interest, or to have met with Theresa Schiavo personally. The federal district court noted that three guardians *ad litem* had been appointed during a period of the litigation, that the case had been extensively litigated, and that there was no precedent requiring a judge to meet personally with a patient in this situation. The court found that the case had been adequately litigated below, and that it was unlikely that the litigants would prevail on an argument of lack of due process.

The parents further argued that Theresa Schiavo's rights under the Religious Land Use and Institutionalized Persons Act[20] had been violated, as removal of the feeding tube was a governmental burden on Theresa's Schiavo's religious freedom. The court held, however, that Michael Schiavo and the hospice where Theresa Schiavo resides were not state actors, and thus no allegation of governmental burden could be made.[21] A final argument regarding equal protection was also rejected as

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[19] Fla. Stat. § 765.401 provides that:.

(1) If an incapacitated or developmentally disabled patient has not executed an advance directive, or designated a surrogate to execute an advance directive, or the designated or alternate surrogate is no longer available to make health care decisions, health care decisions may be made for the patient by any of the following individuals, in the following order of priority, if no individual in a prior class is reasonably available, willing, or competent to act: ... (b) The patient's spouse; ... (d) A parent of the patient; ...

. . . .

(2) Any health care decision made under this part must be based on the proxy's informed consent and on the decision the proxy reasonably believes the patient would have made under the circumstances. If there is no indication of what the patient would have chosen, the proxy may consider the patient's best interest in deciding that proposed treatments are to be withheld or that treatments currently in effect are to be withdrawn.

(3) Before exercising the incapacitated patient's rights to select or decline health care, the proxy must comply with the provisions of §§ 765.205 and 765.305, except that a proxy's decision to withhold or withdraw life-prolonging procedures must be supported by clear and convincing evidence that the decision would have been the one the patient would have chosen had the patient been competent or, if there is no indication of what the patient would have chosen, that the decision is in the patient's best interest.

(4) Nothing in this section shall be construed to preempt the designation of persons who may consent to the medical care or treatment of minors established pursuant to § 743.0645.

[20] 42 U.S.C. § 2000cc-1, *et. seq.*

[21] *See* Harvey v. Harvey, 949 F.2d 1127, 1133- 34 (11th Cir. 1992).

inapplicable to this situation. As the district court found that there was no substantial likelihood of success on the merits, a temporary restraining order was denied.

The United States Court of Appeals for the 11th Circuit then considered the district court's opinion.[22] Review of the district court opinion, however, was performed under an "abuse of discretion" standard. Under this standard, a district court's decision will lead to reversal only if the court used an incorrect legal standard, applied improper procedures, or relied on clearly erroneous fact-finding.[23] The court presumed for purposes of the motion that the Schiavo law was constitutional, and considered its application to the Schiavo case.

The court found that despite the requirement of *de novo* review provided for in the Schiavo Law, the Congress had not changed the standard for *de novo* review. This finding was based in part on the legislative history of the Schiavo Law, which indicated that a provision addressing the issuance of a stay had been deleted from the final version.[24] The court also noted that issues related to standing and abstention had been modified by the Congress, but that the standard for injunctive relief had not. Consequently, the court found that Congress had intended for existing law regarding injunctive relief to be applied in this case.

The court also considered an argument that the appeals court could itself issue a writ for emergency injunctive relied under the All Writs Act.[25] The All Writs Act provides that all federal courts may issue writs to protect their jurisdiction. The court found that the All Writs Act is intended to provide the power to issue writs only when other writs are not generally available. However, when the relief sought under the act is in the nature of a preliminary injunction, and the authority to issue a preliminary injunction already exists, then the All Writs Act is not available.[26]

Based on the preceding, the appeals court declined to overturn the district court rulings. Subsequently, the 11th circuit refused to reconsider the case *en banc,*[27] and the Supreme Court declined to grant a writ of certiorari.

If feeding and nutrition were begun again in this case, the district court would still have pending motions regarding preliminary or permanent injunctive relief. In considering these issues, there appear to be a number of constitutional issues that might be considered.

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[22] Schiavo v. Schiavo, Case No. CV-05-00530-T (11th Cir, March 23, 2005). The opinion is available at [http://news.findlaw.com/hdocs/docs/schiavo/32305opn11.pdf].

[23] *Id.* at 4.

[24] *Id.* at 5-6.

[25] 28 U.S.C. §1651(a).

[26] See Fla. Med. Ass'n v. U.S. Dep't of Health, Education & Welfare, 601 F.2d 199, 202-3 (5th Cir. 1979).

[27] Schiavo v. Schiavo, No. 05-11556 (11th Cir. March 23, 2005).

A. Bill of Attainder

There is a concern that the specificity of this bill may raise constitutional concerns. Article I of the Constitution prohibits passage of Bills of Attainder.[28] Under this provision, Congress is prohibited from passing legislation which "appl[ies] either to a named individual or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial."[29] Generally, the prohibition on Bills of Attainder is intended to prevent the Congress from assuming judicial functions and conducting trials.[30] The two main criteria that the courts will look to in order to determine whether legislation is a Bill of Attainder are (1) whether specific individuals are affected by the statute, and (2) whether the legislation inflicts a punishment on those individuals.[31]

An argument might be made that the Schiavo Law is a bill of attainder, but the precedent for this is very limited. Although the bill itself specifically addresses providing a benefit to the parents of Theresa Schiavo, it could theoretically affect the reputation of Michael Schiavo, and could be seen as interfering with his role as legal guardian of his wife. Although Michael Schiavo is not named in this bill, the Supreme Court has held that legislation meets the criteria of specificity if it applies to a person or group of people who are described by past conduct.[32]

By specifying Theresa Schiavo's parents, limiting the bill to facts that related to a pending case, and providing that the suit must be filed within 30 days, the bill seems to establish criteria that apply only to the case regarding Theresa Schiavo. However, the Supreme Court has found that a piece of legislation which is narrowly focused is not a Bill of Attainder merely because the statute might have been set at a higher level of generality.[33] In order to find that legislation is a Bill of Attainder, a court would have to establish that the legislation was intended to inflict punishment on this individual or individuals.

1. "Punitive" Legislation.

While it is true that the proposed legislation has the potential to alter the proceedings in the particular state court case, this does not necessarily establish that

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[28] U.S. Const. Art. 1, Sec. 9, cl. 3 provides that: "No Bill of Attainder or ex post facto Law shall be passed."

[29] United States v. Brown, 381 U.S. 437, 447 (1965).

[30] Id.

[31] Nixon v. Administrator of General Services, 433 U.S. 425, 472-484 (1977).

[32] Selective Service System v. Minnesota Public Interest Group, 468 U.S. 841, 847 (1984).

[33] 433 U.S. at 470. In fact the Court has upheld a law that specifically affected only one named individual. In Nixon v. Administrator of General Services, the Congress passed the Presidential Recordings and Materials Preservation Act, which directed that the General Services Administration take custody of the presidential papers of a named individual, Richard M. Nixon. The Court held that if there is a rational basis for a legislative classification and no punitive intent, then the Congress may go so far as to legislate against one named individual. 433 U.S. at 472.

this legislation would be found by a court to impose a punishment on Michael Schiavo or others. The mere fact that focused legislation imposes burdensome consequences does not require that a court find such legislation to be an unconstitutional of Bill of Attainder. Rather, the Court has identified three types of "punitive" legislation that are barred by the ban on Bills of Attainder: (1) where the burden is such as has traditionally been found to be punitive; (2) where the type and severity of burdens imposed cannot reasonably be said to further non-punitive legislative purposes; and (3) where the legislative record evinces a congressional intent to punish. Thus, questions may arise as to whether the potential burdens on Michael Schiavo's right to act as her guardian fit into one of these three categories.

2. The Scope of Traditional "Punishment".

The Supreme Court has identified various types of punishments which have historically been associated with Bills of Attainder. These traditionally have included capital punishment, imprisonment, fines, banishment, confiscation of property, and more recently, the barring of individuals or groups from participation in specified employment or vocations.[34] There are no indications by the Court that harming a person's reputation or intervening in guardianship rights is a type of "punishment" traditionally engaged in by legislatures as a means of punishing individuals for wrongdoing.

3. Type and Severity of Punishment.

The Supreme Court has indicated that some legislative burdens not traditionally associated with Bills of Attainder might nevertheless "functionally" serve as punishment.[35] The Court has stated, however, that the type and severity of a legislatively imposed burden should be examined to see whether it could reasonably be said to further a non-punitive legislation purpose.[36] Intervening in guardianship rights does not appear to have been addressed, but there has been legislation regarding affecting a person's position of responsibility.

Various Supreme Court decisions have invalidated as Bills of Attainder legislation barring specified persons or groups from pursuing various professions, where the employment bans were imposed as a brand of disloyalty.[37] For instance, in *Cummings v. Missouri*,[38] the Supreme Court noted that "disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment."

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[34] 433 U.S. at 474-75.

[35] 433 U.S. at 475.

[36] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963); Nixon v. Administrator of General Services, 433 U.S. at 476.

[37] Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 474-75 (1977).

[38] Cummings v. State of Missouri, 71 U.S. 277, 320 (1867).

An opinion by the United States Court of Appeals for the District of Columbia has specifically addressed the issue of whether a congressional bill limiting custodial rights was a Bill of Attainder. In *Foretich v. United States*,[39] the court considered a legislative rider to the 1997 Department of Transportation Appropriations Act entitled "The Elizabeth Morgan Act." This act provided for specific procedures to be followed in resolving child custody cases in the District of Columbia Superior Court, but was written so narrowly as to apply to just one case.[40] This case involved a protracted custody battle, where allegations of sexual abuse by the husband had been made. Because the child in the case was no longer a minor, the issue of removal of custodianship was declared by the court to be moot. However, the court found that the act imposes "punishment" under the functional test because it harmed the father's reputation, and because it could not be said to further non-punitive purpose. To the extent that the proposed bill would harm Michael Schiavo's reputation, these arguments might be applicable.

B. Due Process

A Due Process argument could be made that the bill requires that Theresa Schiavo comply with an additional set of procedural requirements in order to effectuate constitutional rights. The bill would appear to require a named individual to comply with a set of procedural rules that are not required of any other individuals. This may raise issues of whether a substantive due process right, the right to terminate medical treatment, can be specifically burdened. Further, it may raise the issue of Equal Protection, as seen in the context of the substantive due process right to terminate medical treatment.

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[39] 351 F.3d 1198 (D.C. Cir. 2003).

[40] The act provided:

(a) In any pending case involving custody over a minor child or the visitation rights of a parent of a minor child in the Superior Court which is described in subsection (b)

(1) at anytime after the child attains 13 years of age, the party to the case who is described in subsection (b)(1) may not have custody over, or visitation rights with, the child without the child's consent; and

(2) if any person had actual or legal custody over the child or offered safe refuge to the child while the case (or other actions relating to the case) was pending, the court may not deprive the person of custody or visitation rights over the child or otherwise impose sanctions on the person on the grounds that the person had such custody or offered such refuge.

(b) A case described in this subsection is a case in which -

(1) the child asserts that a party to the case has been sexually abusive with the child;

(2) the child has resided outside of the United States for not less than 24 consecutive months;

(3) any of the parties to the case has denied custody or visitation to another party in violation of an order of the court for not less than 24 consecutive months; and

(4) any of the parties to the case has lived outside of the District of Columbia during such period of denial of custody or visitation.

Department of Transportation and Related Agencies Appropriations Act of 1997, P.L. 104-205, § 350 (codified at D.C. Code § 11-925 (2001)).

For instance, in *News America Publishing, Inc. v. FCC*,[41] the United States Court of Appeals for the District of Columbia applied heightened scrutiny to an act of Congress that singled out, "with the precision of a laser beam," a corporation controlled by Rupert Murdoch. Murdoch's corporation had applied for, and received, temporary waivers from the FCC's cross-ownership rules, so that the corporation could acquire two TV licenses, one in Boston and the other in New York.[42] Subsequently, Congress passed a law that prevented the FCC from extending any existing temporary waivers; at the time, Murdoch's corporation was the only current beneficiary of any such temporary waivers. The corporation sued, arguing a violation of Equal Protection in the context of the First Amendment. Based on this argument, the court evaluated the law under a heightened scrutiny standard, and struck it down.[43]

Conclusion

Although cases such as the one involving Theresa Schiavo are generally resolved at the state level, recent events show an increased interest in the Congress in this issue. While intervention regarding this particular case may not be successful, Congress may opt to consider the issue more generally in the future. For a discussion of the many legal issues associated with this type of case, see CRS Report 97-244, *The Right to Die: Constitutional and Statutory Analysis.*

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[41] 844 F.2d 800, 814 (D.C. Cir. 1988).

[42] Id. at 804.

[43] *Id.* at 815.